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Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1992~~ 210

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as WILLIAM RICHARD CAMPBELL, deceased; TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED GARRISON SCHOONMAKER, JR., deceased, and as Administrator of the Estate of DOROTHY P. SCHOONMAKER, also known as DOROTHY PENDLETON SCHOONMAKER, deceased,

Plaintiffs-Appellants,

against

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petititoners, Alice S. Campbell and Townsend L. Schoonmaker, by their attorney, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on January 12, 1966.

Opinions Below.

The United States District Court for the Southern District of New York rendered an opinion and judgment which appear in the Record on Certiorari at pages 125a and 126a and printed copies thereof are appended to this Petition, marked Appendix A and Appendix B, respectively. The Court of Appeals for the Second Circuit rendered no written opinion but affirmed the judgment of the District Court as appears in the Record on Certiorari at page 131a. A Petition for Re-Hearing and Re-Hearing in Banc which appears in the Record on Certiorari at page 133a was denied, as appears in the Record on Certiorari at pages 142a, 144a, 146a and 148a.

Associate Justice John M. Harlan granted an application for an extension of time to and including June 8, 1966 by Order dated the 16th day of May 1966 filed in this Court to file this Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Statement of Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, was dated January 12, 1966, and was entered on the same day.

The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

Question Presented for Review.

Does the judgment of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court for the Southern District of New York, deny the equal protection of the laws guaranteed by the United States Constitution and the Constitution of the State of New York, contained in

the New York State Constitution, and particularly Section 16 of Article 1 thereof, prohibiting the limitation of damages in a wrongful death action.

Constitutional and Statutory Provisions Involved.

The following constitutional and statuory provisions are involved and the pertinent parts are quoted herein as follows:

The Constitution of the United States:

"AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of New York:

Article 1, Section 16, provides:

"Sec. 16. (Damages for injuries causing death.)

The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation. Formerly Sec. 18, renumbered 16 by Constitutional Convention of 1938; approved by the people Nov. 8, 1938."

New Mexico Statutes Annotated, 1953:

"Section 22-20-1. Whenever the death of a person shall be caused by the wrongful act, neglect

or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

"Section 22-20-2. Every action instituted by virtue of the provisions of this and the preceding section must be brought within three (3) years after the cause of action shall have accrued.

"Section 22-20-3. Every such action as mentioned in Section 1821 (22-20-1) shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: Provided, he or she shall have left a husband, wife, child, father, mother, brother, sister or child or children of the deceased child, but shall be distributed as follows:

• • • • • •

"Section 22-20-4. Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of

any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars, or of any driver of any state (stage) coach or other public conveyance, while in charge of the same as driver; and when any passenger shall die from injury resulting from, or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall, forfeit and pay for every person or passenger so dying, the sum of ten thousand dollars ($10,000), which may be sued and recovered; first, by the husband or wife of the deceased; or second, if there be no husband or wife, or if he or she fails to sue within six (6) months after such death then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother; or fourth, if the deceased be over twenty-one (21) years of age and unmarried, by a dependent father or mother or dependent brother or sister, who may join in the suit; and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In the event there are no such persons entitled to sue or in the event suit is not brought by any such persons within nine (9) months after such death, suit may be brought by the personal representative or representatives of such deceased person."

Statement of the Case.

The judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, affirmed the judgment of the District Court for the Southern District of New York which granted summary judgment in the statutory amount of $10,000, as provided in Section 22-20-4 of the New Mexico Statutes Annotated, 1953, quoted above, for each of the three decedents' deaths and otherwise dismissed the complaint against the defendant. The basis of the District Court's jurisdiction was diversity of citizenship of the parties and that the amount involved exceeded $3,000.

This is an action for the wrongful death of William R. Campbell, also known as William Richard Campbell, of Alfred G. Schoonmaker, also known as Alfred Garrison Schoonmaker, and of Dorothy P. Schoonmaker, also known as Dorothy Pendleton Schoonmaker, passengers on a Trans World Airlines airplane which crashed while off course in the Sandia Mountains on a flight from Albuquerque to Santa Fe, New Mexico, on February 19, 1955. All passengers and crew were killed. The plaintiffs-appellants, residents of the States of New Jersey and California, respectively, as administrators of the estates of William R. Campbell, also known as William Richard Campbell, and of Alfred G. Schoonmaker, also known as Alfred Garrison Schoonmaker, and of Dorothy P. Schoonmaker, also known as Dorothy Pendleton Schoonmaker, brought suit under the laws of New Mexico, New York, and the United States against Trans World Airlines, alleging that death had been proximately caused by the negligence, recklessness and carelessness of the defendant, its agents, servants and employees and for violation of applicable laws and regulations in the operation of the airplane and in each case demanded damages greatly in excess of $10,000. The defend-

ant moved in the District Court for summary judgment on the ground that Section 22-20-4, New Mexico Statutes, Annotated, 1953, pleaded as a first affirmative defense by the defendant, is the exclusive statute under which an action for wrongful death may be brought and limits the damages for each death to $10,000.

The District Court, while recognizing that the law of New York must be applied in the instant case, held that the Constitution of the State of New York, cited above, Article 1, Section 16, prohibiting the limitation of damages in a wrongful death action, and the opinion of the Court in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, applying that constitutional prohibition to a multi-state transaction applied only to the case of residents of the State of New York. This decision flies in the face of the facts in the instant case which establish that numerous contacts were had of the parties to the action with the State of New York and under the Choice of Law Doctrine of the Law of Conflict of Laws requires the application of the local law to the instant action even though the plaintiffs and their decedents slept in New Jersey instead of New York where they spent their waking hours, paid taxes, spent money for many purposes and bought the airline tickets from defendant who likewise operated in New York—landing and taking off its planes there and advertising its flights there.

Argument and Reasons for Allowance of the Writ.

The basic reason for seeking a Writ of Certiorari is because the judgment of the District Court, as affirmed by the Court of Appeals for the Second Circuit, is clearly a violation of the equal proctection of the laws provided for in the Fourteenth Amendment of the Constitution of the United States.

The District Court, by its decision, determined that a different rule of law was to be applied to non-residents regardless of their contacts with the State of New York, as compared with the rule of law to be applied to residents. This decision was made despite the fact that there is no case holding that such a distinction may be made constitutionally unless there is sound reason for it supported by a statutory or constitutional provision. In the instant case there is no statute in the State of New York, nor is there any constitutional provision providing for or indirectly supporting the distinction that has been made by the District Court and affirmed by the Court of Appeals for the Second Circuit.

Section 16 of Article 1 of the New York State Constitution provides as follows:

> "§ 16. (Damages for injuries causing death.) The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation. Formerly Sec. 18, renumbered 16 by Constitutional Convention of 1938; approved by the people Nov. 8, 1938."

The Court of Appeals in the case of *Kilberg* v. *Northeast Airlines*, 9 N. Y. 2d 34, 211 N. Y. Supp. 2d 133, an action for wrongful death which had occurred in Massachusetts, held

> " . . . Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. The number of States limiting death case damages has become smaller over the years but there are still 14 of them (compare the list in Tiffany, Death by Wrongful Act [1st Ed., 1893], p. xvii, with the data found in Martindale-Hubbell Law Digests, 1960 Ed., Vol. IV). An air

traveler from New York may in a flight of a few hours' duration pass through several of those commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters. There is available, we find, a way of accomplishing this conformably to our State's public policy and without doing violence to the accepted pattern of conflict of law rules.

"Since both Massachusetts (General Statutes, ch. 229, Secs. 1, 2, as in effect in Sept. 1958) and New York (Decedent Estate Law, Consol. Laws, c. 13, Sec. 130) authorize wrongful death suits against common carriers, the only controversy is as to amount of damages recoverable. New York's public policy prohibiting the imposition of limits on such damages is strong, clear and old. Since the Constitution of 1894, our basic law has been (N. Y. Const., art. I, Sec. 16; N. Y. Const. [1894], art. I, Sec. 18) that 'The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.' Each later revision of the State Constitution has included this same prohibition against limitations of death action damages. The reasons for its adoption are set forth in the proceedings of the 1894 Constitutional Convention (see discussion in Lincoln's Constitutional History of New York, Vol. III, pp. 57-65, and in Medinger v. Brooklyn Heights R. Co., 1896, 6 App. Div. 42, 39 N. Y. S. 613). New York's original wrongful death law (L. 1847, ch. 450) passed very soon after Lord Campbell's Act became law in

> Great Britain, had like the latter no restriction as to damages. The Legislature later imposed such limits but the Convention which drew the 1894 Constitution rejected and forbade them. 'The argument which evidently controlled the convention in its action consisted of the claim that the arbitrary limitation was absurd and unjust, in measuring the pecuniary value of all lives, to the next of kin, by the same arbitrary standard' (Justice Hatch in Medinger opinion, supra, 6 App. Div. at page 46, 39 N. Y. S. at page 616). The absurdity and injustice have become increasingly apparent in the six decades that have followed. For courts to be limited by this damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law (see Mertz v. Mertz, 271 N. Y. 466, 471, 3 N. E. 2d 597, 598, 108 A. L. R. 1120; Shannon v. Irving Trust Co., 275 N. Y. 95, 102, 103, 9 N. E. 2d 792, 794). The Massachusetts cases likewise say that Massachusetts will enforce the *lex loci delicti* in wrongful death suits unless Massachusetts public policy forbids (see Higgins v. Central New England & W. R. Co., 155 Mass. 176, 29 N. E. 534; Jackson v. Anthony, 282 Mass. 540, 545, 547, 185 N. E. 389)."

The court, in the *Kilberg case,* in holding that the law of New York in respect to limitation of damages should apply, pointed out that in the case of *Conklin v. Canadian-Colonial Airways,* 266 N. Y. 244, the court struck down a limitation of liability printed on the plane ticket because it was contrary to New York's public policy although it was held valid in New Jersey where the plane crashed. The court also pointed out in *Wooden* v. *Western New York & Pennsylvania Railroad Company,* 126 N. Y. 10, that the Court of Appeals in New York had enforced a New York

limitation of damages (as it then existed) although Pennsylvania had at that time no limitation, pointing out that a restriction as to damages does not affect the substantive right to damages but is a procedural matter, and, being such, the law of the forum can apply under the rule in Conflict of Laws.

This rule of law setting forth the public policy of New York State in this area has been upheld by the Court of Appeals of New York in three cases:

Kilberg v. *Northeast Airlines,* 9 N. Y. 2d 34;
Davenport v. *Webb,* 11 N. Y. 2d 392;
Babcock v. *Jackson,* 12 N. Y. 2d 473.

and has also been applied as constitutional by the United States Court of Appeals for the Second Circuit in the case of *Pearson* v. *Northeast Airlines,* 309 Fed. 2d 553. (Certiorari has been denied by the United States Supreme Court.)

The law of New York on this subject is clear—there can be no limitation of damages in a wrongful death action and this law may be applied constitutionally if the facts involved in a multi-state transaction such as the one at Bar give New York State such interest in the transaction as to justify applying its local law as opposed to the law of a foreign state under the choice of law doctrine of the Law of Conflicts of Law. Residence of the decedents is not a sine qua non to the constitutional application of the rule.

Thus the determination of this appeal depends on whether there exists in this multi-state transaction, such connection of the deceased with the State of New York or such interest of New York State in the transaction as to constitutionally permit the application of the New York rule of damages as opposed to the New Mexico limitation of damages or the law of New Jersey.

The rulings in the cases of *Kilberg* v. *Northeast Airlines, supra,* and *Pearson* v. *Northeast Airlines, supra,* should be applied in the case at Bar even though the deceased herein were residents of New Jersey.

The courts of New York cannot apply a different rule to a non-resident from that applied to a resident. *Peoples Trust Company of Binghamton* v. *Goodell, et al.,* 236 N. Y. Supp. 549 (Sup. Ct. 1929); *Holzer* v. *Deutsche Reichbahan Gesellschaft* (Supp. 1930), 290 N. Y. Supp. 181, aff'd 289 N. Y. Supp. 748, reversed on other grounds, 277 N. Y. 474, both of which cite the 1881 case of *Hibernia National Bank* v. *Lacombe, et al.,* 84 N. Y. 367, wherein it is stated, at p. 385:

> "Once properly in court and accepted as a suitor, neither the law, nor court administering the law, will admit any distinction between the citizen of its own State and that of another. Before the law and in its tribunals there can be no preference of one over the other (Abraham v. Plestoro, 3 Wend. 548; Johnson v. Hunt, 23 id. 91; Hoyt v. Thompson, 5 N. Y. 351; Merrick v. Van Santvoord, 34 id. 217; Blake v. Williams, 6 Pic. 206)."

The facts established by the depositions of the plaintiffs Alice S. Campbell and Townsend L. Schoonmaker taken in this pending action by the defendant, which were handed up upon the argument of defendant's motion for summary judgment (3a-41a) bring the instant case clearly within the purview of the public policy of the State of New York, as set forth in Section 16 of Article 1 of the Constitution of New York State, and as upheld in the cases cited above.

District Judge McGohey, sitting as the trial judge in the case of *Pearson* v. *Northeast Airlines* (199 Fed. Supp. 539), ruled as follows (page 540):

> "In this diversity case, this court sits as another state court of New York (citing Guaranty Trust Co. of New York v. York, 326 U. S. 99, 108, 65 S. Ct. 1464, 89 L. Ed. 2079) and must apply New York's conflicts law as announced by its highest court (citing Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 6 S. Ct. 1020, 85 L. Ed. 1477."

Judge McGohey then referred to the *Kilberg* rule with approval as the law of New York, saying at page 539:

> "I believe therefore, that it (the Kilberg rule) states the law which, if this suit were pending in a New York Court, that court would apply. Accordingly, since I believe I am required to apply it here, I hold that the amount recoverable by this plaintiff is not limited to $15,000."

Judge McGohey, in considering whether the damages should be measured by the New York standard of pecuniary damages or the standard of the Massachusetts statute, also said at page 540:

> "Chief Judge Desmond pointed out that since 1894 New York's Constitution, article 1, section 18, has forbidden not only abrogation of the then existing statutory right of action for damages for injuries resulting in death, but also 'any statutory limitations' on the 'amount recoverable' in such actions. The Chief Judge quoted with approval the observation of Mr. Justice Hatch in Medinger v. Brooklyn Heights R. R. Co., that 'The argument which evidently controlled the convention (of 1894) in its action consisted of the claim that the arbitary limitation (of damages) was absurd and unjust, in measuring the pecuniary values of all lives to the next of kin by the same arbitrary standard."

This Court must of course apply the law of New York State to this case. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64;

Klaxon v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487; and *Baldwin* v. *Powell*, 294 N. Y. 130.

The rule of law of New York State and the decisions in the above cited cases establish that whenever a wrongful death action is brought in a court in New York State, whether State or Federal, no limitation of damages shall be had, providing the deceased had such contacts with New York State or the transaction resulting in the wrongful death involved the interests of New York State sufficiently to justify the application of its local rule of law under the conflict of laws doctrine of choice of law.

In the instant case, while the plaintiffs' intestates were not residents of the State of New York, their contacts with the State of New York generally, and particularly in connection with the transactions involved in this action resulting in their deaths, were such as to require the application of the New York doctrine forbidding the limitation of damages.

There are at least seven contacts of the plaintiffs with the State of New York which certainly give the State of New York an interest in this multi-state transaction so great and so vital as to justify on constitutional grounds the application of the New York law to a transaction which resulted in the deaths of plaintiffs' intestates. Those factual contacts are amply supported by the affidavits and exhibits and depositions submitted on defendant's motion for summary judgment by the plaintiffs and referred to above.

The constitutional provision (Article 1, Section 16 of the New York State Constitution) is self-executing. It requires no action by the legislature. Its language is clear and the intent is unmistakable that "the amount recovered (in an action for injuries resulting in death) shall not be subject to any statutory limitation."

The Constitutional Convention of 1894 adopted this provision as Article 1, Section 18 and it was renumbered by the Constitutional Convention of 1938 as Article 1, Section 16, without other change. In the Convention of 1894, it was proposed that this provision should be limited to the citizens or inhabitants of the State of New York.

That limitation was rejected.

The provision was enacted as it now stands with the clear intent that it should apply to all actions resulting from wrongful death, regardless of whether the deceased or their representatives bringing the action, were residents or not of the State of New York.

In Volume III of the Constitutional History of New York by Charles Z. Lincoln the history of this provision is set forth. Mr. Lincoln was apparently a delegate to the Constitutional Convention of 1894. Following the passage of a bill in the English Parliament in 1845 providing for recovery for wrongful death, the author states that he does not find any attempt was made in Parliament "to limit the amount recovered". In 1847 the New York Legislature enacted the English statute without any limitation. In 1848 railroad and canal companies tried to have it repealed without success and in 1849 various limitations were introduced in bills. A Statute limiting recovery to $5,000 was apparently enacted as a result of this agitation but the subject was brought to the attention of the Constitutional Convention of 1894 and a short amendment was introduced that no statutory limitations shall be placed upon the amount of damages. The next day another amendment was introduced, a little more elaborate (page 60 of Mr. Lincoln's work), which had a dual provision saying that no law shall be passed limiting the damages for loss of any human life "or in which there shall be involved a question of the death

of any citizen or inhabitant of this State. But the amount of damages in any such action shall remain forever entirely within the discretion of the jury". It seems significant both that there was one provision placing no limit whatever and then in the alternative a provision relating to a question of the death of a citizen or inhabitant of New York. There was "long and animated debate", and apparently every aspect of the question was included in the discussion (page 61 of Lincoln's work).

It is especially significant that the final form of the provision (page 64) dropped out any reference to the death of a citizen or inhabitant. As the matter was apparently thoroughly debated the Convention apparently considered limiting the benefits of the provision to citizens and inhabitants only and then firmly decided as a matter of public policy not to so limit its application. It is also significant that this provision is in the Bill of Rights.

Not only were the tickets of the deceased in the case at Bar bought in New York but the two male decedents worked in New York and they were killed while on a business trip. The principal executive offices of their company was in New York City and had been for many years. All contracts, reports, tax returns, etc., were prepared at 50 Church Street, which was their official address. Income tax returns were filed in New York and all directors' and stockholders' meetings were held there.

It is the public policy of New York to encourage non-residents to do business here. This also finds expression in the State Constitution. Article 16, Section 3, provides that intangible personal property shall not be taxed *ad valorem*, nor shall the possession thereof be subject to any excise tax.

Of course, non-residents who do business in New York must pay taxes in connection with their business the same

as residents but when this provision (Section 3 of Article 16) was put into the Constitution in 1938 the revised records of the Constitutional Convention (pages 748-749) show that the purpose behind this section was to guarantee to non-resident individuals and foreign corporations that they can keep their money and securities in the State of New York without any fear of adverse taxation and thus encourage enormous amounts of intangibles from all over the United States to be brought to New York "making for the conservation of the financial center of the country here".

That being the obvious intention of this provision of the highest law of the State of New York and there being such contact with the State of New York and such interest by the State of New York in the transaction involved in this action as to justify, on constitutional grounds, an application of the law of the forum as distinguished from the law of the place of the tort, plaintiffs in this action are clearly entitled to have the first defense stricken from the answer.

The leading case in the Second Circuit is, of course, *Pearson* v. *Northeast Airlines, Inc., supra,* in which Judge McGohey at trial term accepted and applied the law of New York as enunciated in its Constitution, Article 1, Section 16, and by the Court of Appeals in *Kilberg* v. *Northeast Airlines, Inc., supra.* On appeal to the Circuit Court of Appeals for the Second Circuit, a bench of three sitting reversed Judge McGohey two to one. Judge Kaufman wrote a dissenting opinion and a reargument being granted by the Court *en banc* his views were adopted and Judge McGohey's decision affirmed.

Judge Kaufman, in his dissent, when the Circuit Court of Appeals with three judges sitting, considered the matter (307 Fed. 2d 131), stated (p. 138) as follows:

> "At the threshold of my consideration of the constitutional implications of the Kilberg decision, I

pause to note that Kilberg did not work any revolution in traditional conflict of laws philosophy. The case involved nothing more than a particular application of a doctrine well established in New York and elsewhere that a state may refuse to apply principles of substantive law 'borrowed' from other states in accordance with standard choice of law rules, when the foreign principles conflict with some fundamental public policy of the forum. See Stumberg, Conflict of Laws 198 (2 ed. 1951); Coster v. Coster, 289 N. Y. 438, 442, 46 N. E. 2d 509, 512, 146 A. L. R. 702 (1943); Mertz v. Mertz, 271 N. Y. 466, 473, 3 N. E. 2d 597, 599, 108 A. L. R. 1120 (1936); Hartness v. Aldens, Inc., 301 F. 2d 228 (7th Cir. 1962). Moreover, as revealed in a comprehensive analysis of the 'public policy' concept as it pertains to choice of law rules,

> 'All the commentators would retain the public policy principle in conflicts to the extent that it is grounded in basic moral conceptions or in ideas of fundamental justice and we agree. If the foreign law normally applicable violates the strongest moral convictions or appears profoundly unjust at the forum, the law should not be applied. The principle can be defended on the ground that above all, any court's job is to aim at the just accommodation of controversy or, perhaps, with the notion that the decisions of courts should not "exhibit to the citizens of the state an example pernicious and detestable." (Greenwood v. Curtis, 6 Mass. 358, 378 (1810).") Paulsen and Sovern, "Public Policy" in the conflict of Laws, 56 Colum. L. Rev. 969, 1015 (1956).'

"Whether the 'public policy' doctrine has been used in order to avoid necessary re-evaluation of outmoded and inadequate choice of law rules, a criticism suggested by Professors Paulsen and Sovern, or, as Professor Cavers has observed, whether it is used as an avenue of escape from mechanical rules creating injustice, see Cavers A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173, 183 (1933),

> 'It is apparent * * * that in most cases the choice of local rather than foreign law (because of "public policy") cannot be regarded simply as a matter of parochialism. The common invocation of the public policy argument is * * * an assertion of the forum's right to have its law applied to the transaction because of the forum's relationship to it.' Paulsen & Sovern, op. cit. supra, at 981.

"In Kilberg, the New York Court of Appeals, in essence, made precisely that assertion. The court continued to recognize a number of Massachusetts substantive rules incidental to plaintiff's claim, and thereby paid lip service to the lex locus delicti rule. But its refusal to recognize the "entirely fortuitous" circumstance of an airplane's fatal descent into Massachusetts territory as compelling an application of an 'absurd and unjust' limitation (which would result in 'anachronistic' treatment of lawsuits for wrongful death in New York courts) is best explained as an assertion of New York's right to apply its own 'internal' law to this issue. See Paulsen & Sovern, supra, at 980-981, 992-998," and at p. 142 Judge Kaufman pointed out:

> "'As one of our leading students of this subject has concluded on the basis of an exhaustive review of the relevant Supreme Court cases through 1958, 'a state court's choice of law will be upset under the Full Faith and Credit Clause or the Due Process Clause only when the state whose law is applied has no legitimate interest in its application'. Currie, the Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9, 75 (1858). And the validity of Professor Currie's conclusion has been demonstrated by a recapitulation of case law made by Chief Justice Warren, speaking for a unanimous court in the recent case of Richards v. United States, 369 U. S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962):

> 'Where more than one state has sufficiently substantial contact with the activity in question, the forum state, by analysis of the interest possessed by the states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity. Id., at 15, at 594 of 82 St. Ct.'
>
> "Therefore, the precise question which must be decided in this case is whether New York has a "sufficiently substantial contact" with the events surrounding the action maintained by Mrs. Pearson for the death of her husband in this particular airplane crash.
>
> It is not yet entirely clear what contacts are sufficient to permit a state to apply its own substantive law to a wrongful death action where the physical impact causing death occurs in another jurisdiction. Cf. Note, 74 Harv. L. Rev. 357, 388 (1960),"

and also at pp. 143 and 144:

> "For instance, a persuasive argument can be made that New York has an interest in requiring Northeast Airlines to maintain safe facilities elsewhere. The contention could be summarized as follows: Northeast Airlines is a foreign corporation authorized to do business in New York. Pursuant to that authorization, it maintains ticket offices throughout the state, and actively promotes the use of its transportation facilities by New York citizens by widespread advertising and special fares between New York City and cities in other states. It operates a full schedule of flights from New York airports, where it offers various additional conveniences intended to attract patrons from competing airlines.
>
> "As a result of this business activity, it earns a substantial amount of revenue from New York citizens. Is it unreasonable to suggest that New York, in order

to protect its citizens from avoidable dangers which may result in loss of life, e.g., inadequate facilities maintained by the airline in the states to which it transports New York citizens, should promote safety practices by rendering the airline liable for the consequences of such negligence *in the same manner that New York holds airlines liable for negligent acts committed within its borders?* One of the principal justifications of tort liability is its expected effect upon the standard of care used in hazardous operations. Does the majority suggest that New York has any less interest in the airline's safety practices when a plane operating out of a New York airport flies a great distance over New York territory only to crash a few miles outside of its borders (because the crew was negligent seconds after crossing the state line) than it would if the negligence occurred a few moments earlier? Yet we are told that if the negligence occurred moments before in New York, that state could apply its own law regardless of the place of the crash. See Richards v. United States, supra. As the New York Court of Appeals pointed out in Kilberg, the reality of air transportation has emptied such distinctions of real meaning.

"In the present case Mr. Pearson, a New York citizen, boarded the airplane at a New York airport, after buying a ticket at the airline's New York Offices. On the theory suggested above, New York's contact with this series of events is clear enough, and its interest in preventing negligence which would cause the airplane to crash is self-evident. By contrast, since there is no suggestion of negligence after the crash and no damage to persons or property on the ground 'it is doubtful that the application of the Massachusetts wrongful death act in a case such as this * * * would have any real effect on conduct within that state.' 74 Harv. L. Rev. 1652, 1654 (1961). Certainly Massachusetts did not expect to reduce the airline's insurance rates by means of its statute.

> Northeast Airlines operates in many states, and could suffer accidents in any of them." (Emphasis supplied)

Judge Kaufman also wrote the majority opinion in the *Pearson* case when it was decided by the nine judges of the full bench, six to three, to affirm the judgment made in the District Court, except as to the award of interest.

Judge Kaufman wrote in part as follows at pages 555-556 (309 F. 2d 553):

> "The principal question considered by this court en banc is whether a federal court sitting in the state of New York may constitutionally 'apply' a Massachusetts statute giving a cause of action for wrongful death and refuse for reasons of state policy, to follow a provision of that statute which would limit the plaintiff's recovery to $15,000.
>
> "The issue being one of great significance the constitutional power of the states to develop conflict of law doctrine—it was ordered, upon application by the plaintiff-appellee and the affirmative vote of a majority of the active judges of this circuit, that the appeal be reheard en banc.
>
> "As a consequence of this rehearing and extensive reconsideration of the issues and pertinent authorities, six active judges of this Court have reached a conclusion contrary to that of the majority of the original panel, and adopt this writer's dissent from the opinion of the panel, appearing at 307 F. 2d 136 (1962). We hold that the ruling of the New York Court of Appeals in Kilberg was a proper exercise of the state's power to develop conflict of laws doctrine; and the court's refusal to apply the limitation of recovery provision in the Massachusetts statute a constitutional exercise of such power. The judgment of the District Court is therefore affirmed, as modified in accordance with the panel's unanimous hold-

ing on the issue of pre-judgment interest. This issue requires no further discussion.

"Several additional considerations which we shall discuss, convince us that the conclusion we have reached is compelled."

Judge Kaufman also wrote at page 559 as follows:

"Our decision cannot, therefore, be interpreted to condone a forum applying its own rules in a wanton manner by labeling matters 'procedural' while arbitrarily choosing the parts of a foreign statute it wishes to enforce by labeling them 'substantive'. We do hold, however, that a state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law. If, indeed, those connections are wholly lacking or at best tenuous, then it may be proper to conclude that the state has exceeded its constitutional power in applying its local law. See, e.g., Home Insurance Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926 (1930); Currie, "The Constitution and the Choice of Law: Governmental Interests and the Judicial Function" 26 U. Chi. L. Rev. 9, 75 (1958). But that is, ex hypothesi, not the case before us.

"We must emphasize that we are not concerned here with the wisdom of New York's choice-of-law, but only with its power to choose as it did in Kilberg.

"The Supreme Court has in fact held that a state may choose to ignore or to qualify defenses that arise under the laws of another state. Watson v. Employers Liability Assurance Corp., 348 U. S. 66, 75 S. Ct. 166 99 L. Ed. 74 (1954), held that the concern of Louisiana for the protection of its residents was sufficient to empower it to hear in its courts a direct action against a non-resident insurance company, despite a no action clause in a Massachusetts contract allegedly controlling the obligations of the

> insurer. We therefore see no escape from the proposition we announce today, that a legitimately interested state may, under the circumstances of this case, apply a firmly fixed and long existing policy of its own, although this would remove a defense provided by an 'integral' provision of the locus' statute creating the cause of action."

In the case of *Bournias* v. *Atlantic Maritime Co. Ltd.*, 220 F. 2d 152, Judge Harlan, at that time a Circuit Judge for the Second Circuit, stated at page 154:

> "The general rule appears established that for the purpose of deciding whether to apply local law or foreign law, statutes of limitations are classified as 'procedural'. Stumberg, Conflict of Laws 147 (1951); Lorenzen, Statutes of Limitation and the Conflict of Laws, 28 Yale L. J. 492 (1919). Hence, the law of the forum controls."

The searching analysis by Judge Kaufman in the Pearson case, considered with the history of the adoption of the constitutional provision of the State of New York (Article 1, Section 16, formerly 18) is so compelling that it is hard to see how this Court can refuse to remove from this case any limitation of damages.

The Court's attention is drawn particularly to the contact fact established by the affidavit of William E. Connor, marked Exhibit "H", attached to the affidavit of Edmund H. H. Caddy, sworn to May 10, 1965 (113a-116a). This affidavit shows that the Liberty Mutual Insurance Company is a Massachusetts corporation, duly licensed to do business in the State of New York and therefore a corporate resident of the State. It also shows that the company is virtually a plaintiff in this action by reason of its lien upon any judgment recovered by the plaintiff, Alice

S. Campbell. This company has paid in excess of $17,000 in Workmen's Compensation benefits to Alice S. Campbell, widow of the deceased. This Workmen's Compensation coverage was obtained by the A. G. Schoonmaker Company, Inc., the corporation doing business in New York State and employing the deceased Mr. Campbell, and the premium on the policy was paid by that company out of its New York funds. Mr. Campbell was covered by the Workmen's Compensation Law of the State of New York. This fact must be regarded as a most potent reason for New York State to apply its rule of law referred to in the *Kilberg* case and certainly justifies the application of that rule under the choice of law rule of Conflict of Laws. The Court's attention is also drawn to the case of *Alaska Packers Association* v. *Industrial Accident Commission,* 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044. This case is cited in the majority opinion of the Circuit Court of Appeals for the Second Circuit in *Pearson* v. *Northeast Airlines, Inc.,* 309 F. 2d 553 at page 560, quoting the Court in the *Alaska Packers* case as follows:

> "The necessity (to decide the extent 'to which the statute of one state may qualify or deny rights asserted under the statute of another') is not any the less whether the statute and policy of the forum is set up as a defense to a suit brought under the foreign statute or the foreign statute is set up as a defense to a suit or proceedings under the local statute. In either case, the conflict is the same. In each, rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale

of decision according to their weight." 294 U. S. at 547, 55 S. Ct. at 524.

In the *Alaska Packers* case, the United States Supreme Court ruled that California had "a legitimate public interest in compelling and regulating this employer-employee relationship in such fashion as to impose a liability upon the employer for an injury suffered by the employee and in providing a remedy to him in California" (pages 542-543) even though the injury had been suffered outside the State.

Before concluding this brief, I must draw the Court's attention to the fact that Judge McGohey, at the time of ruling as to the limitation of damages in the *Pearson* case, ruled in a companion case, *Trauth* v. *Northeast Airlines, Inc.*, that he would not apply the *Kilberg* rule in that case because the deceased had not been a New York resident, having lived in New Jersey. Whether the deceased in that case had had any contacts at all with New York State, does not appear in any of the reported decisions, the *Trauth* case apparently not being reported at all. There is no evidence before us of any such contacts in the *Trauth* case. It is to be doubted that any contacts existed in the *Trauth* case of equal potency with those existent in the case at Bar. If there had been, it is submitted that Judge McGohey's ruling was in error.

The *Babcock* v. *Jackson* decision in 1963 is clearly a signpost indicating that the old rule in Conflict of Laws that applied the *lex loci delecti* is no longer to be the hard and fast rule but rather the "choice of law" rule or the "center of gravity" or the "grouping of contacts" rule as indicated in 1954 by the New York State Court of Appeals in the case of *Auten* v. *Auten*, 308 N. Y. 155. The *Babcock* case is a further signpost along the road pointed out in the *Auten* case.

It would seem that in a given case where the facts involve more than one state, the law of the state having the most contacts with the incident involved is the law to be applied. The following cases decided since the *Babcock* case are clearly indicative of this:

Fornaro v. *Jill Brothers,* 22 A. D. 2d 695, 253 N. Y. Supp. 2d 771 (2d Dept., 1964);
Dym v. *Gordon,* 22 A. D. 2d 702, 245 N. Y. Supp. 2d 856 (2d Dept., 1964);
DeLavigne v. *DeLavigne,* New York Law Journal October 6, 1964;
Long, et al. v. *Pan Am,* New York Law Journal, December 18, 1964.

In the instant case the contacts of the State of New York with the incident involved and the persons involved greatly exceed in number the contacts of the State of New Mexico with the incident. In the case of Mr. Campbell, the only contact the State of New Mexico had with him was the crash of the plane in New Mexico causing his death. In the case of Mr. and Mrs. Schoonmaker, the only contact the State of New Mexico had with them, in addition to the crash of the plane killing them in the State of New Mexico, was the possible repurchase of tickets for that one leg of their journey in New Mexico. There seems to be a dispute as to whether or not this leg of the journey in their case was covered by the purchase of tickets from TWA in New York before they left for the business trip, which, of necessity, was to take them to Albuquerque and Santa Fe. The contacts of the State of New York with the incident and the persons involved are many and important, as is indicated in the affidavit of Edmund H. H. Caddy submitted upon defendant's motion and the exhibits attached thereto (79a-116a). These contacts are almost too numerous to mention.

Conclusion.

It is respectfully submitted that the Petition should be granted, and the Writ issue.

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20 Exchange Place,
New York, New York 10011,

Milton S. Seligman,
First National Bank Building,
Albuquerque, New Mexico,
Attorneys and Counsel for
Plaintiffs-Appellants.

APPENDIX A.

Campbell and Schoonmaker v. TWA—Opinion.

TYLER, D. J.

It is firmly agreed in this district that the N. Y. Courts, either in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34 (1961) or in any subsequent case, have given no indication that they would apply New York's public policy against limitation of damages in wrongful death actions other than to deceased traveling citizens of New York in actions brought by their surviving dependants domiciled in New York. *Gore* v. *Northeast Airlines, Inc.*, 222 F. Supp. 50 (S. D. N. Y. 1963); *Skahill* v. *Capital Airlines, Inc.*, 9 Aviation Cases 17, 246 (S. D. N. Y. 1964), aff'd. F. 2d , 2d Cir., April 20, 1965; see also unreported decision of Judge McGohey in *Truath* v. *Northeast Airlines, Inc.*, Civ. No. 149-256.[1]

Since neither decedents nor their representatives bringing these consolidated actions are or were citizens or residents of New York, defendant's motions for summary judgment based on its first defense seeking to limit its liability to $10,000 in accordance with the applicable New Mexico death statute (New Mexico Statutes annotated, Section 22-20-4) and for the judgment on the pleadings in favor of the three plaintiffs for $10,000 each is granted.

Settle order accordingly on notice.

/s/ H. R. TYLER JR.,
U. S. D. J.

September 1, 1965

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[1] For the most recent New York Appellate decision in point known to the writer, see *Long* v. *Pan American World Airways, Inc.* decided June 22, 1965, App. Div., 1st Dept., 34 L W 2039.

APPENDIX B

Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as WILLIAM RICHARD CAMPBELL, deceased, TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED GARRISON SCHOONMAKER, JR., deceased, and as Administrator of the Estate of DOROTHY L. SCHOONMAKER, also known as DOROTHY PENDLETON SCHOONMAKER, deceased,

Plaintiffs,

against

TRANS WORLD AIRLINES, INC.,

Defendant.

Civil 107-114

The defendant having moved this court for an order pursuant to Rule 67 of the Federal Rules of Civil Procedure and pursuant to Title 28 of the U. S. Code §2042, permitting defendant, Trans World Airlines, Inc. to pay into court the sum of $10,000 in favor of the plaintiff Alice S. Campbell, as administratrix of the Estate of William R. Campbell, $10,000 in favor of the plaintiff Townsend L. Schoonmaker, as administrator of the Estate of Alfred Garrison Schoonmaker, and $10,000 in favor of the plaintiff Townsend L. Schoonmaker, as administrator of the estate of Dorothy L. Schoonmaker, the total sum being

$30,000 plus interest accrued up to the day of deposit of said money which is $5.00 per diem based on a 6% per annum rate, and that costs, if any, recovered by defendant with respect to the appeal to be taken herein by plaintiffs will be deducted from the aforesaid sum on a pro rata basis with respect to each death claim, and discharging, to the extent of the payment made hereunder, the defendant from all further liability with respect thereto, and that defendant should pay into court the aforementioned sum, and said motion coming on to be heard herein on the 28th day of September 1965 and plaintiffs having consented to said motion without prejudice to the appeal to be taken herein and without prejudice to contesting the applicable interest accrued therein by a subsequent motion to be filed after the conclusion of appellate review and determination of the underlying order and judgment of Judge H. R. Tyler, Jr., entered herein on the 10th day of September, 1965.

Now, on motion of Bigham, Englar, Jones & Houston, attorneys for the defendant, it is

ORDERED that the defendant's motion to pay into the registry of the court the sum of $10,000 in favor of plaintiff Alice S. Campbell, as Administratrix of the Estate of William R. Campbell, $10,000 in favor of the plaintiff Townsend L. Schoonmaker, as Administrator of the Estate of Alfred Garrison Schoonmaker, and $10,000 in favor of the plaintiff Townsend L. Schoonmaker, as Administrator of the Estate of Dorothy L. Schoonmaker, the total sum being $30,000 plus interest accrued up to the day of deposit of said money which is $5.00 per diem based on a 6% per annum rate, to await the final determination of this action be, and the same hereby is granted; and it is further

ORDERED that the deposit of the aforementioned sum is without prejudice to the plaintiffs to the appeal taken herein on the 21st day of September, 1965 and without prejudice to the plaintiffs herein with respect to the amount of interest applicable to said sums of money, such reservations to

be made by a motion, if any, after the conclusion of the appellate review when an Order is sought for the release of the sum deposited pursuant to 28 U. S. C. 2042.

H. R. TYLER, JR.,
U. S. D. J.

Dated New York, N. Y.
October 7th, 1965.

BRIEF IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 210

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as WILLIAM RICHARD CAMPBELL, deceased; TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED GARRISON SCHOONMAKER, JR., deceased, and as Administrator of the Estate of DOROTHY P. SCHOONMAKER, also known as DOROTHY PENDLETON SCHOONMAKER, deceased,

Petitioners,

—against—

TRANS WORLD AIRLINES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN J. MARTIN and
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99 John Street
New York, New York 10038
Attorneys and Counsel for Respondent

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 1392

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as WILLIAM RICHARD CAMPBELL, deceased; TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED GARRISON SCHOONMAKER, JR., deceased, and as Administrator of the Estate of DOROTHY P. SCHOONMAKER, also known as DOROTHY PENDLETON SCHOONMAKER, deceased,

Petitioners,

—against—

TRANS WORLD AIRLINES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This action was brought by the petitioners on behalf of the estates of the three decedents to recover for the deaths of the decedents while passengers in an airplane of the respondent which crashed during a scheduled intra-state flight within the State of New Mexico.

The respondent pleaded (R-110a)* as a first defense that its liability, if any, was limited by Section 22-20-4

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* References designated "R" refer to pages of appendix in the Circuit Court of Appeals, a copy of which has been submitted as the Record herein.

of the New Mexico Statutes Annotated, 1953, (Pet., pps 4-5) providing for a limitation of $10,000 for the death of any passenger of a common carrier.

As there was no issue of fact, respondent moved for an order and judgment pursuant to Rules 56(b) and 12(c) of the Federal Rules of Civil Procedure granting summary judgment and directing the entry of judgment in favor of the petitioners for $10,000 each. This motion was granted and judgment was thereafter entered (the Petition refers to Appendix B as the order and judgment entered but that appendix is actually the order allowing deposit of the amount of the judgment into court; the order and judgment of the District Court appears in the Record at 126a-128a). The Court of Appeals for the Second Circuit unanimously affirmed the judgment (R-131a; Appendix C).

The petitioners argued below, as they do here, that the law of the State of New York, as found in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34, was applicable. Both the District Court and the Court of Appeals rejected this argument pointing out, among other things, that the Petitioners, the estates and the decedents are not and never were residents nor citizens of the State of New York. In view of the findings of the lower courts the portions of the Petition relative to the "Question Presented For Review", "Constitutional and Statutory Provisions Involved" and "Statement of the Case" do not present a complete and correct picture to this Court of what is involved here. We believe a more detailed "Statement of the Case" will put the matters in a proper perspective.

Statement of the Case

The accident involved occurred on February 19, 1955, over 11 years ago. This action has been pending since February 19, 1956, over 10 years ago. The facts, pleadings and other actions that have evolved in the meantime demonstrate the correctness of the decisions below.

In February of 1955 the decedents Alfred G. Schoonmaker and his wife, Dorothy L. Schoonmaker, and their son-in-law, William R. Campbell, were admittedly (p. 6 Pet.) residents and citizens of the State of New Jersey. Mr. Campbell was president of the A. G. Schoonmaker Company, Inc., 50 Church Street, New York, N.Y., and required to travel to San Francisco. He purchased a ticket (R-119a-121a) from the respondent in New York City on February 17, 1955, which included a routing from Albuquerque, New Mexico, to Santa Fe, New Mexico, for February 19, 1955.

Mr. Campbell traveled to Albuquerque where he met the Schoonmakers who decided to fly with him to Santa Fe. They purchased their tickets for cash at the Municipal Airport, Albuquerque, N.M. (the Petition, p. 16, alleges all tickets were bought in New York but that is not factually correct as only Mr. Campbell's was). In accordance with their tickets the Schoonmakers and Mr. Campbell boarded respondent's intrastate flight at Albuquerque on the morning of February 19, 1955. They were killed when the aircraft crashed in New Mexico en route to Santa Fe (R-77a).

On June 27, 1955, the petitioner Alice S. Campbell was appointed administratrix of the estate of William R. Campbell by the Surrogate of Bergen County of the State of New Jersey (R-95a-96a). It is admitted that she was at the time of the death of her husband and still is a resident and citizen of the State of New Jersey as are her three children (R-77a). On April 29, 1955, the petitioner Townsend L. Schoonmaker was appointed Administrator, with the wills annexed, of the estates of Mr. and Mrs. Schoonmaker by the Surrogate of Bergen County of the State of New Jersey (R-96a). It is admitted (R-78a) that at the time of the death of his parents he was a resident and citizen of the State of New Jersey and that he is now a resident and citizen of the State of California (Pet. p. 6).

This action was commenced on February 19, 1956. The complaint (R-95a) sets forth that the causes of action arise under the statutes of the State of New Mexico and seeks recovery for the wrongful death of the decedents. The Petition (p. 6) alleges that the action is brought "under the laws of New Mexico, New York, and the United States". This is incorrect. Paragraph 15 of the complaint specifically pleads New Mexico law. The petitioners have never sought to amend nor change these allegations of the complaint.

Respondent's answer (R-105a) generally denies the allegations of the complaint except that it admits that the aircraft crashed killing the decedents and that the actions arise under the New Mexico Wrongful Death Statutes. As a first defense, it is pleaded that the causes of action, if any, arose within New Mexico and

are (as was claimed by the complaint) created and governed by the Statutes of New Mexico; and that the applicable Wrongful Death Statute of the State of New Mexico is New Mexico Statutes of 1953 Annotated, Chapter 22, Article 20, Section 4 which limited the right of recovery for wrongful death to the sum of $10,000 per passenger.

The respondent's answer was served on March 8, 1956. Since that date petitioners principal activity has consisted of attempts to circumvent the limitation under the New Mexico Death Statute. In February of 1958, actions were commenced on behalf of the estates in the State and Federal Courts in New Mexico against the pilot of the aircraft. These actions, as hereinafter detailed in Point III, resulted in dismissal of the complaints on the basis that the causes of action were covered by Section 22-20-4 of the New Mexico Statutes and that under such statutes the sole remedy was against this respondent. One of these actions (*Campbell et al.* v. *Matteucci et al.*) was affirmed by the United States Court of Appeals for the Tench Circuit, 261 F. 2d 225. A petition to this Court for *certiorari* was denied at 359 U.S. 966.

While these petitioners were pursuing their rights in New Mexico and New York, other actions arising out of the crash were also tried. In such actions, as hereinafter detailed in Point III, the $10,000 limitation under Section 22-20-4 was upheld.

At the conclusion of their New Mexico actions, and in line with the respondent's prior Offer of Judgment, pursuant to Rule 68 of the Federal Rules of

Civil Procedure, in the amount of $10,000 for each decedent, discussions were had as to settlement based on the limited amount provided by Section 22-20-4. The negotiations progressed to the point where the action was marked "discontinued" but the settlement was never concluded because by that time the Court of Appeals of the State of New York decided the *Kilberg* case, supra. In that case the court ruled that, where a resident or domiciliary of the State of New York was involved, the courts of the State of New York would not enforce the monetary limitation of the death acts of a sister state.

Following the *Kilberg* decision petitioners had this action restored to the trial calendar. Although it was reached for trial several times it was never tried. In March of 1965 respondent obtained an Order and Judgment (R-126a-128a) in favor of the petitioners in the amount of $10,000 for each decedent. The basis for the decision (Appendix A) of Judge Tyler in the District Court was that *Kilberg* provides that the public policy of New York against foreign limitations is applicable to its own residents or domiciliaries only and that since the petitioners and decedents admittedly were neither residents nor domiciliaries of New York, they could not take advantage of that ruling of the New York Court of Appeals. The United States Court of Appeals for the Second Circuit affirmed (Appendix C) without opinion.

In view of the foregoing it is submitted that this litigation does not present a question of denial of rights under the 14th Amendment to the Constitution of the United States nor under Article 1, Section 16

of the Constitution of the State of New York. The question, rather, simply involves the correctness of the lower courts' interpretation of New York law.

ARGUMENT

POINT I

The decisions below were correct.

In *Klaxon* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487, this Court laid down the rule that the Federal Courts sitting in the State of New York must apply the conflict of laws doctrine of the State of New York to cases where jurisdiction is based upon diversity of citizenship.

The petitioners herein argue that the law applicable is to be found in the *Kilberg* case, 9 N.Y. 2d 34, and in *Pearson* v. *Northeast Airlines, Inc.*, 309 F. 2d 553, cert. den. 372 U.S. 912, Both *Kilberg* and *Pearson* arose out of the same accident and both involved residents of the State of New York. *Pearson* was tried subsequent to *Kilberg* and both the District Court and the United States Court of Appeals for the Second Circuit adhered to the *Kilberg* ruling.

The *Kilberg* case arose out of an airplane accident which occurred in Massachusetts. In that case the Court of Appeals of the State of New York held that since a New York resident and citizen was involved it would not enforce any provision of the death act of a sister state which placed a monetary limitation on damages. The Court of Appeals pointed out that it was against the public policy of the state

to enforce a limitation against New York citizens. It stressed that its decision to disregard the Massachusetts limitation was prompted by its desire to "provide protection for our own State's people * * *" 9 N.Y. 2d 39. This holding has been followed by other cases in the State of New York (*Riley* v. *Capital Airlines, Inc.*, 13 A.D. 2d 889; *Bopp* v. *Bell*, 18 A.D. 2d 914) but only where the decedent and his dependents have been New York residents.

The distinction between residents and non-residents follows the cases interpreting the Due Process Clause (U.S. Const. Amend. XIV Section 1) which forbids a state from applying its public policy unless it has substantial contacts in the matter. *Home Ins. Co.* v. *Dick,* 281 U.S. 397. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143. It also is in line with the cases relative to the Full Faith and Credit Clause (U.S. Const. Art. IV, Section 1) which hold that in such a situation a state need not apply another state's law in preference to its own. *Pacific Employers Ins. Co.* v. *Industrial Acc. Comm.*, 306 U.S. 493; *Richards* v. *U.S.*, 369 U.S. 1.

This distinction between residents and non-residents and its strict application has been clearly demonstrated in a number of decisions holding that *Kilberg* is not applicable where non-residents are involved. The distinction was made in *Trauth* v. *Northeast Airlines, Inc.* (S.D. N.Y., 1961, unreported) which involved New Jersey domiciliaries and was tried with *Pearson* in the Southern District of New York. In *Trauth* Judge McGohey, who held that *Kilberg* applied in *Pearson,* found that the Mas-

sachusetts limitation was applicable since the decedents were not residents of New York.

A definitive decision on the question is *Skahill* v. *Capital Airlines, Inc.*, 234 F. Supp. 906, aff'd by 2nd Cir. without opinion, April 12, 1965, — Fed. 2d —, cert. denied 382 U.S. 878. In that case the plaintiff's decedent was killed in a crash on a flight between Washington Airport, Virginia and Norfolk, Virginia. At the time of the accident the decedent and his family were domiciled in Massachusetts. At the time of the commencement of the action in New York, the family were residing in Rhode Island. In applying the Virginia limitation of $30,000 Judge Levet pointed out that the basis for *Kilberg* was residency in New York and that the decedent and the plaintiff were non-residents. (It should be noted that the Second Circuit in affirming the lower Court herein indicated on the oral argument that the *Skahill* case was determinative).

Another action arising out of the same accident as *Skahill* is *Mulhern* v. *Capital Airlines*, S.D. N.Y., unreported, aff'd. 2d Cir., 353 F. 2d 738. There the decedent and his widow were residents of Massachusetts and summary judgment based upon the Virginia limitation was granted. The court, referring to *Kilberg,* again pointed to the fact that neither decedent nor plaintiff were residents of New York.

In *Tramontana* v. *S.A. Empresa de Viacoa Aerea Rio Grandense (Varig)*, 350 F. 2d 468, the United States Court of Appeals for the District of Columbia followed the logic of *Kilberg* and *Trauth* and applied the law of Brazil in a wrongful death action com-

menced as the result of the death of a Maryland resident in an air crash in Brazil. This Court denied certiorari at 383 U.S. 943.

POINT II

The arguments of petitioners are not supported by the record.

a.

The petitioners raise no question of conflict between any circuits nor is any important question of constitutional law raised. The only question raised actually relates to a matter of the interpretation of decisions of the State of New York. In such circumstances this court's holding in *Huddleston* v. *Dwyer*, 322 U.S. 232, and *Ragan* v. *Merchant's Transfer & Warehouse Co.*, 337 U.S. 530 is particularly applicable. In *Huddleston* this court said at page 237:

> "* * * The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, except in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. Rublin v. New York Life Ins. Co., 304 U.S. 202, 206-7. * * *"

b.

Petitioners raise no exceptional matters here. Their argument is simply that the *Kilberg* doctrine is applicable. It is apparently contended that the

decedents had such significant and substantial contacts with New York that its public policy should be applicable. There is no basis in law or fact to substantiate this argument.

Admittedly petitioners were and are not residents nor citizens of New York nor did they have any contacts with New York. Indeed the only claimed contacts relate to the employment in New York of two of the decedents, Messrs. Campbell and Schoonmaker. The third decedent, Mrs. Schoonmaker, was a housewife who resided in New Jersey.

While we fail to see the relevance of these contacts with New York, it should be noted that the claimed employment contacts are sketchy at best. Both decedents traveled a great deal. They worked as many days out of New York as they did in the state (R-112a, 119a). Furthermore, the company which employed them was in the process of moving to California (R-34a). This move was completed shortly after the accident.

These meager contacts with New York are greatly outweighed by the facts which proved that Mr. Campbell and Mr. and Mrs. Schoonmaker (R-5a, 36a) owned houses in New Jersey where they lived, ate, etc., in company with the remainder of their families. Their close contacts with New Jersey are further demonstrated by the exercise by the Surrogate's Court of Bergen County, New Jersey, of jurisdiction over the estates of each of the decedents (R-95a-96a).

That residence is the most important consideration is stressed in each of the 4 cases cited on page 27 of the Petition (the correct citations of the *Dym* case is 16 N.Y. 2d 120 and of the *Long* case is 16 N.Y. 2d 338, both of which are reversals of the Appellate Division reports cited). In each case the matter of residency was the principal point upon which the decisions turned.

In none of such cases is there any indication that the courts of the State of New York would hold that residents and citizens of the State of New Jersey should be given the advantage of the *Kilberg* ruling and thus have the law of New York applied to an accident which occurred in New Mexico.

c.

As a result of the various contacts of the petitioners, the decedents and the estates with the State of New Jersey, this court may ask what is the law of that State in the matter.

As can be inferred from the fact that the petitioners do not rely upon it, New Jersey has no provision in its Constitution similar to Section 16 of Article 1 of the New York State Constitution nor has it any clearly defined public policy on limitations in death actions.

d.

The petitioner's argument at page 12 that the New York courts must apply the same rule to a non-resident as that applied to a resident overlooks the

basic matter that there is involved here a matter of conflict of laws and not simply the matter of a citizen of New York seeking enforcement of statutory rights. The cases cited, furthermore, involved actions by non-residents based on New York statutes. In each case the court merely held that the non-residents could avail themselves of such statutes.

Finally, the argument also overlooks the right of a state to discriminate between residents and non-residents as contrasted with the constitution prohibition of discrimination against citizens of the state. Such distinction is recognized in many decisions.

Robinson v. *Oceanic Steam Navigation Co.*, 112 N.Y. 315
Klotz v. *Angle*, 220 N.Y. 347

e.

The petitioners argue at pages 14-16 that the rejection in 1894 of a proposed amendment to the section that is now Article 1, Section 16 of the New York State Constitution demonstrates that as enacted it was intended to cover other than citizens of the State of New York.

Again petitioners ignore the fact that the issue here is primarily a question of conflict of laws and not the application of that section of the New York State Constitution. Furthermore an examination of the work cited (Vol. III, *Constitutional History of New York* by Charles Z. Lincoln pps. 59-62) fails to support petitioners position relating to the back-

ground of the proposed amendment. In 1847 the New York State legislature had enacted a Wrongful Death Statute similar to the English Lord Campbell's Act, without limitation. Over the years, through pressure from various groups, the legislature had enacted monetary limitations—this is what the first portion of the proposed amendment referred to. Over the same period of time, the courts had engrafted a holding that the act did not apply to an action by the husband for the death of his wife—this is what the second part of the proposed amendment refers to. This second part led to the inclusion of the language "any citizen or inhabitant" and was *not* an attempt to exclude non-residents.

POINT III

The New Mexico death statute.

There have been other actions arising out of this crash that have been tried in the state and federal courts in New Mexico and in each it has been held that the applicable statute was Section 22-20-4.

In *Schloss, as Adm., etc.* v. *Matteucci, as Adm., et al.*, 260 F.2d 16 (10th Cir. Oct. 1958) the estate of a passenger sued the respondent and the estate of the pilot. The trial court held that Section 22-20-4 was applicable and awarded to the plaintiff the statutory amount of $10,000 against the respondent. The court also ruled that the statute excluded liability of the pilot and dismissed the action against his estate. On appeal to the Tenth Circuit that court unanimously affirmed the trial court's decision.

In *Re Reilly's Estate*, 63 N.M. 352, 319 P.2d 1069, the estate of a passenger sued the estate of the pilot. The Supreme Court of New Mexico held that under Section 22-20-4 recovery could only be made against the carrier and affirmed the lower court's dismissal of the action against the pilot's estate.

The result in the *Reilly* case was the same as the results in actions brought in New Mexico by these petitioners against the estate of the pilot:

Campbell, et al. v. *Matteucci, et al.*, 261 F.2d 225; cert. den. 359 U.S. 966.

Ertz, as Adm. of estate of Dorothy L. Schoonmaker v. *Matteucci*, action in Dist. Ct., Second Judicial Circuit, County of Bernadillo, N.M.

These prior decisions are binding on petitioners and it is submitted that they are now collaterally estopped from litigating the issue of the limitation of liability. Such estoppel is recognized by the courts of the State of New York.

Hinchey v. *Sellers*, 7 N.Y.2d 287.

Israel v. *Wood Dolson Co.*, 1 N.Y.2d 116.

Good Health Dairy Products Corp. v. *Emery*, 275 N.Y. 14.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be denied.

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